FRONT Report LINE

April 2004 OFFICE OF MISSOURI ATTORNEY GENERAL Vol. 11, No. 1

Nixon urges legislators to quickly clarify law

Following a Missouri Supreme Court decision on concealed weapons, Attorney General Jay Nixon is urging the Legislature to quickly pass legislation giving sheriffs clear guidance.

Legislators last year passed HB 349 to authorize qualified Missourians to apply for a permit to carry a concealed firearm. Several plaintiffs sued to enjoin HB 349 from taking effect, claiming the law violated Article I, Section 23 of the Missouri Constitution and also violated the Hancock Amendment because it would impose an unfunded mandate on local sheriffs.

The AG's Office represented the state before the Missouri Supreme

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Attorney General Nixon on April 7 spoke to about 90 sheriffs about the concealed-carry law and the legal challenges.

Officers can frisk, seize weapons temporarily

While some changes to statutes are anticipated in response to the Supreme Court decision, the law now requires the director of revenue to place a concealed weapons endorsement on drivers licenses (Section 570.101, RSMo.)

Also, Section 571.121 requires anyone carrying a concealed weapon to carry the endorsement and to "display the concealed carry endorsement upon the request of any peace officer."

Throughout the concealed-carry law debate, officers repeatedly asked what authority they had to frisk individuals

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Top court upholds checkpoint

Illinois v. Lidster
No. 02-1060
Jan. 13, 2004

The U.S. Supreme Court upheld the constitutionality of a checkpoint set up to ask motorists about a hit-and-run accident that occurred one week earlier at the same location and time.

As the defendant approached, his van swerved, nearly hitting an officer. He failed a sobriety test after the officer smelled alcohol, and later was convicted of driving while under the influence.

In judging the checkpoint's reasonableness, and its constitutionality, the court relied on the "gravity of the public concerns served by the seizure, the degree to which the seizure advances the public's interest, and the severity of the interference with individual liberty" (*Brown v. Texas*, 443 U.S. 47, 51).

The relevant public concern was grave: Police were investigating a death-related crime, and the stop significantly advanced this concern given its timing and location.

Most important, the stops interfered only minimally with liberty of the sort the Fourth Amendment protects.

Viewed objectively, each stop required only a brief wait in line and seconds-only contact with police. Viewed subjectively, the systematic contact provided little reason for anxiety or alarm, and there is no allegation that the police acted in a discriminatory or unlawful manner.

No questioning allowed after traffic stop ends

The Missouri Supreme Court issued an opinion re-emphasizing that once an officer has completed a traffic stop, the driver must be released and not further questioned or detained.

The March 9 opinion strongly reminds officers they cannot continue to detain a motorist upon completion of a stop unless the officer has:

- The person's voluntary consent to remain; or
- Independent reasonable suspicion of some other illegal activity to justify a further detention.

In *State v. Barks*, a state trooper stopped Barks for driving 74 mph in a

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55-mph speed zone in Wayne County. After receiving a citation, Barks appeared to be nervous. Based on this behavior, the officer questioned Barks and asked for permission to search his vehicle four times, but was denied permission each time. Finally, Barks allowed a search of his vehicle, which contained meth and meth-making ingredients.

The Supreme Court did not dispute that Barks' consent to search was given voluntarily. The illegality, however, came from the officer's continued detention of Barks after completion of the stop. The court held that Barks' continued detention was not voluntary because a reasonable person in Barks' situation would not believe he was free to leave.

Had the officer told Barks he was free to leave, and had Barks stayed to answer questions, then the subsequent search would have been lawful, the Supreme Court stated.

The court also concluded that the continued detention of Barks following completion of the traffic stop could not be justified based on the officer's belief that he had reasonable suspicion based on Barks' nervousness. Nervousness alone did not give the officer reasonable suspicion to detain Barks.

Again, had the officer gathered more factors that would provide a trained, experienced officer with reasonable suspicion, the continued detention of Barks would have been lawful.

Since the detention was illegal, any evidence found during the detention must be excluded as evidence.

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Court in asserting that HB 349 did not violate these constitutional provisions.

On Feb. 26 in *Brooks, et. al. v. State of Missouri*, SC 85674, the court found that Article I, Section 23 — which says the right to bear arms shall not justify the wearing of concealed firearms — does not prohibit the Legislature from authorizing Missourians to obtain concealed-carry permits.

But the court did find that the law violates the Hancock Amendment, Article X, sections 16 and 21, because the $100 fee that sheriffs can charge for processing permits may only be used for training and equipment. Since these purposes do not cover the cost of background checks, the court ruled this is an unfunded mandate.

Since the only evidence presented at trial related to costs incurred by Jackson, Greene, Camden and Cape Girardeau counties, the court's order enjoining the law only applies to those counties. The ruling leaves open the possibility that other counties could seek to enjoin the law. Already, a Hancock challenge has been filed in Moniteau County.

PROPOSED LEGISLATION

Attorney General Nixon, working with Rep. Larry Crawford and Sens. Harold Caskey and Jim Mathewson, has proposed a change that would address the Hancock Amendment concerns. SB 1332, heard in the Senate Judiciary Committee on March 15, would allow sheriffs to use the $100 fee to perform any necessary duties to carry out the concealed-carry law.

FRISKS: CONTINUED FROM PAGE 1

who had a lawful permit. Early on, Attorney General Jay Nixon opined that enactment of a concealed weapons permit law would cause more searches during traffic and other lawful stops.

Under the Fourth Amendment, officers are allowed to "frisk" or "pat down" those whom they have reasonable suspicion to believe may be armed. They do not have to believe that their possession may be illegal. The justification to frisk is to increase safety so officers may conduct an investigation or make a stop without an unnecessary fear for their safety.

An officer can search for and temporarily seize weapons (even legally carried ones) during a lawful stop. An officer's determination that someone has an endorsement gives him reasonable suspicion to believe the person is armed.

An officer must return a weapon at the end of a stop if there is no cause to believe it is possessed illegally or is evidence of a crime.

Also, pat down searches are permitted for safety reasons only if an officer has reasonable suspicion the suspect may be armed. But an officer may not frisk everyone who is stopped. While state law makes possession of a concealed weapon lawful under certain circumstances, it does not provide reasonable suspicion to search every stopped motorist.

Officers and agencies are strongly encouraged to contact their legal advisers and local prosecutors for additional advice.

Front Line Report is published periodically by the Missouri Attorney General's Office. It is distributed to law enforcement officials throughout the state. Find issues at moago.org/law.htm

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UPDATE: CASE LAW

Opinions can be found at www.findlaw.com/casecode/index.html

U.S. SUPREME COURT

JUVENILE EXECUTIONS

Roper v. Simmons
No. 03-633

The U.S. Supreme Court granted certiorari in the Missouri case on the issue of the constitutionality of executing the petitioner who was 17 at the time of the murder. The Missouri Supreme Court held that such an execution of a juvenile was unconstitutional.

SIXTH AMENDMENT RIGHT

Fellers v. United States
No. 02-6320, U.S.S.C., Jan. 26, 2004

The accused's Sixth Amendment rights were violated when police "deliberately elicited" information from the accused at his home after he had been indicted, without counsel, and without waiving his Sixth Amendment rights.

Because of erroneously determining that the petitioner was not questioned in violation of Sixth Amendment standards, the Eighth Circuit improperly conducted its "fruits" analysis under the Fifth Amendment in determining whether later statements made at the police station, following Miranda warnings, were admissible.

In applying *Oregon v. Elstad*, to hold that the admissibility of the jailhouse statements turned solely on whether they were knowing and voluntary, the court did not reach the question whether the Sixth Amendment requires suppression of those statements on the ground that they were the fruits of previous questioning that violated the Sixth Amendment deliberate-elicitation standard.

The court remanded the case to the Eighth Circuit on that question.

EXCULPATORY EVIDENCE

Banks v. Dretke
No. 02-8286, U.S.S.C., Feb. 24, 2004

When police or prosecutors conceal significant exculpatory or impeaching material in the state's possession (withholding evidence that would have allowed a defendant to discredit essential prosecution witnesses), it is ordinarily incumbent on the state to set the record straight. The Fifth Circuit erred in dismissing the death row inmate's Brady claim with respect to one such witness, and in denying him a certificate of appealability with respect to another.

MISSOURI SUPREME COURT

ARMED CRIMINAL ACTION

State v. Paul Williams
No. SC8355, Mo. banc, Jan. 13, 2004

The Missouri Supreme Court held that instructions for armed criminal action must include the mental state of knowingly or purposely. The court overruled the appellate decision of *State v. Cruz*, 71 S.W. 3d 612 (Mo. App. 2001), which held that the prescribed mental state for armed criminal action is the same as for the underlying felony.

The September 2003 revisions to MAI's for armed criminal action had been changed to reflect the *Cruz* decision. Prosecutors are being advised to use the former instructions for armed criminal action, before September 2003, until the Supreme Court Committee on Instructions can revisit the issue. The prior forms submit "knowingly" as the mental state for armed criminal action. However, the state always can submit the higher mental state of "purposely" if that is more consistent with the evidence in the case. See Note 10 to MAI-CR 3d 304.02, page 304-11.

According to the court in Williams, pursuant to Section 562.021.3, RSMo, a culpable mental state is required even if the definition of the offense does not expressly state one. In such a circumstance, the requisite mental state is established if the defendant acts purposely or knowingly. Because the definition of armed criminal action does not expressly state a culpable mental state, the required mental state is that of acting purposely or knowingly.

The pattern charge for armed criminal action, MACH-CR 32.02, also requires the charging instrument to include the statement that the defendant "knowingly" committed the underlying felony.

EASTERN DISTRICT

EVIDENCE - MOTIVE OF ANOTHER

State v. Mark Manzella
No. 81894, Mo.App., E.D., Feb. 24, 2004

The trial court did not abuse its discretion by excluding evidence that the victim had a pending case for drug distribution as evidence that another person had a motive to murder him. The evidence failed to connect anyone other than the defendant to the crime. Although the evidence might suggest an alternative motive for the crime, it did not cast suspicion on an identifiable person.

AFFIDAVITS FOR SEARCH WARRANT

State v. James E. Kirby Jr.
No. 83368, Mo.App., E.D., Feb. 24, 2004

In a state appeal, the court affirmed the granting of a motion to suppress. The application for search warrant and supporting affidavit did not indicate corroboration of the information provided by a "cooperative individual."

Although the affidavit included facts that indicated personal knowledge of the "cooperative individual," there was no reference to corroboration of information by the detective in the affidavit. The detective testified at the suppression hearing that he took steps to corroborate the information; however the testimony was not presented to the issuing court in support of the search warrant application.

UPDATE: CASE LAW

WESTERN DISTRICT

DRUG COURTS

State v. Shane W. Crowe

No. 62267, Mo.App., W.D., Feb. 24, 2004

Upon appeal from his conviction on one felony count of possessing meth and one misdemeanor count of possessing drug paraphernalia, the defendant argued that by refusing to consider him for drug court, the trial court improperly punished him for exercising his right to a jury trial. The court held that a defendant does not have a right to consideration for drug court. The Legislature authorized circuit courts to determine who is a good candidate for drug court. Section 478.005.1, RSMo, provides, "Each circuit court shall establish conditions for referral of proceedings to the drug court."

COCAINE POSSESSION – ELEMENT OF CONTROL

State v. Carlos A. Chavez

No. 62048, Mo.App., W.D., Jan. 30, 2004

In a prosecution for possession of cocaine found in a car in which the defendant was a passenger, the evidence sufficiently supported an inference that the defendant had control over the cocaine. The driver testified the defendant was carrying a bag when he picked him up and said he had "a lot of stuff on him" and they "needed to get out of Northtown." The driver testified the cocaine was not his and that he had not seen the cocaine before its discovery by police. The cocaine was found next to where the defendant had been seated, an area over which he had superior access.

INSTRUCTIONS – LESSER-INCLUDED OFFENSES

State v. Larry R. Hostetter Jr.

No. 62301, Mo.App., W.D., Feb. 24, 2004

In a trial for first-degree assault, the court did not err in refusing to instruct the jury on the lesser-included offense of third-degree assault. Considering the facts in a light most favorable to the defendant, there was no basis for a reasonable juror to find or infer the defendant did not purposely cause serious injury when he repeatedly struck the young child with his hands and knocked the child out of the truck as the defendant backed it down a driveway.

Because there was no basis in the record for acquittal of the greater offense of first-degree assault, the trial court did not commit reversible error in refusing to instruct on third-degree assault.

INSTRUCTIONS – DEFINITIONS

State v. Jason Farris

No. 61517, Mo.App., W.D., Jan. 27, 2004

The court reversed the defendant's conviction of attempt to manufacture meth, Section 195.211, RSMo, 2000, because the court failed to instruct the jury on the definition of "possession" in the verdict director. MAI-CR3d 325.06.2, the pattern jury instruction for attempt to manufacture a controlled substance, and its accompanying Notes on Use do not list possession as a term that is required to be defined in all cases or is authorized to be defined by the court on its own motion or upon written request of the parties.

Similarly, the Notes on Use to MAI-CR3d 333.00, the pattern instruction for defining terms, does not provide that possession is required or authorized to be defined in this case. The court found, however, that Note 2D to MAI-CR3d 333.00 required it to be defined since it was an essential element of the crime, as it was defined by the charging document as a substantial step for committing the crime.

The failure to define possession allowed the jury to return a verdict without having to find that Jason Farris had the requisite knowledge and control to meet the statutory definition of constructive possession, an essential element of the offense.

CLOSING ARGUMENT – PUNISHMENT

State v. Mark R. Davis

No. 61884, Mo.App., W.D., Jan. 27, 2004

The court reversed the defendant's conviction when the prosecuting attorney argued punishment for the first time in the rebuttal portion of closing argument. In the first part of closing argument, the assistant prosecuting attorney told the jury that her fellow assistant prosecuting attorney would discuss punishment in the rebuttal portion of closing argument. He did not.

The second assistant prosecuting attorney then addressed the jury and, over a timely objection by defense counsel, was allowed to argue for a 30-year sentence. The purpose of rebuttal argument is to give the party bearing the burden of proof, the state, a chance to reiterate matters it raised in opening argument and to respond to defense arguments. The state made no argument about sentencing in the opening part of its closing argument and then argued for a specific punishment in rebuttal.

Allowing the state to argue for a specific punishment in rebuttal when only a mere mention of an intent to do so was made in the first portion of closing argument would, absent a waiver by the defendant, undermine the rule's purpose by taking away defense counsel's opportunity to respond to the state's argument.

VOIR DIRE

State v. Germon A. Everage

No. 61030, Mo.App., W.D., Jan. 13, 2004

The court did not abuse its discretion in denying the motion to quash the jury panel because the defendant failed to show the panel was collectively prejudiced when a few jurors expressed concerns about the defendant's note-taking activity during voir dire. The court also did not plainly err in submitting a second-degree murder without the "sudden passion" language because there was no evidence that the defendant acted with sudden passion when he helped his brother beat the victim.

UPDATE: CASE LAW

MIRANDA – WAIVER OF RIGHTS

State v. Michael L. Farris

No. 61802, W.D., Jan. 27, 2004

The defendant's anticipatory written invocation of his Fifth Amendment right to counsel while in jail on a pending burglary charge did not bar his interrogation over a murder that took place eight months later, while he was on pretrial release on bond for the burglary charge.

The defendant waived his Miranda rights at the interrogation for the murder. In general, the anticipatory assertion of the Fifth Amendment right to counsel, made outside of the context of a custodial interrogation, is not effective and does not bar police from initiating interrogation regarding other offenses when the defendant waives his Miranda rights prior to that interrogation.

When an assertion of the Fifth Amendment right to counsel is made while a defendant is in custody for an offense, further interrogation regarding other offenses is prohibited unless there has been a break in custody between the original assertion of rights and the subsequent interrogation. When a break in custody has occurred, a defendant must reassert his Fifth Amendment right to counsel to be protected.

CRIMINAL NONSUPPORT

State v. Warren Watkins

No. 62508, Mo.App., W.D, Jan. 13, 2004

The court reversed the defendant's conviction of criminal nonsupport. While it is relevant that the defendant was paying less than that ordered in the civil divorce action, it is insufficient to conclusively establish criminal liability.

In awarding child support, the underlying assumption is that a child should receive the amount of money that his parents would have spent if the household were intact. The court may consider extraordinary child-rearing costs. While a parent may bear civil liability for failing to pay certain expenses, he is criminally liable only if he fails to provide the basic necessities of life.

PERSISTENT OFFENDER

State v. Tony R. Gibson

No. 61455, Mo. App., W.D., Dec. 30, 2003

The court reversed and remanded the judgment of sentence as a persistent offender, Section 577.023.3, for a DWI conviction, Section 577.010. The state failed to introduce evidence that established beyond a reasonable doubt to warrant a finding that the defendant had been convicted of at least two prior intoxication-related traffic offenses.

The state, therefore, failed to prove that the defendant was a persistent offender since his municipal DWI conviction for being in "physical control of a motor vehicle while under the influence of alcohol," which the court used to sentence the defendant as a persistent offender, no longer qualifies as an intoxication-related traffic offense.

SOUTHERN DISTRICT

INSTRUCTIONS – LESSER OFFENSES

State v. Paul R. Taylor

No. 25559, Mo.App., S.D., Jan. 21, 2004

In a prosecution for second-degree murder at which the defendant was found guilty of involuntary manslaughter, the trial court did not plainly err in submitting to the jury instructions on the lesser-included offenses of voluntary manslaughter and involuntary manslaughter. The defendant claimed the court violated his due process right to pursue an "all-or-nothing" strategy to avoid conviction.

The Notes on Use to MAI-CR 3d 313.08 — the instruction on voluntary manslaughter — state that once evidence of sudden passion arising from adequate cause has been introduced, and an instruction on voluntary manslaughter is requested by a party, or on the court's own motion, the voluntary manslaughter instruction "will be given." MAI-CR 3d 313.08, Notes on Use 3.

There was evidence of sudden passion arising from adequate cause in that there was testimony from that victim and another assaulted defendant. The state requested the instruction on voluntary manslaughter. Therefore, the trial court was obliged, per the Notes on Use governing MAI-CR 3d 313.08, to give the voluntary manslaughter instruction to the jury.

As for the involuntary manslaughter instruction, a supplemental Note on Use to MAI-CR 3d 313.10 — the approved instruction on involuntary manslaughter — states that the instruction on involuntary manslaughter "will be given" if justified by the evidence and if requested by one of the parties or on the court's own motion. MAI-CR 3d 313.00(4)(A)(4).

The involuntary manslaughter instruction was justified by the evidence in that the extent and severity of the victim's injuries suggest the defendant reasonably could have been found reckless as to the amount of force he used to repel what he perceived as an attack by the victim. The record also reveals that the defendant requested the instruction on involuntary manslaughter.

Even if the defendant had indicated he wanted to pursue an "all-or-nothing" defense, his claim would have no merit. As noted above, the Notes on Use allow not only the defendant but either party, or the court on its own motion, to request the submission of the instructions on voluntary manslaughter and involuntary manslaughter.

The court found no authority for the proposition that a trial court commits plain error when the instructions on lesser-included offenses are given in compliance with the Notes on Use governing those instructions. The trial court therefore was required, per the provisions of the Notes on Use accompanying those instructions, to give them to the jury.

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Nixon pushes tough new meth legislation

Attorney General Jay Nixon is calling on state legislators to implement tough new measures to curb meth use and production.

Nixon outlines his meth proposals to the Show-Me Anti-Meth Coalition.

His proposals include creating a statewide grand jury to provide law enforcement with the necessary speed and investigative resources to break up meth rings that cross county lines; creating a system that ensures meth offenders complete drug treatment in prison; and repealing legislation passed last year that reduced penalties for those convicted of possessing meth. HB 1376 is pending in committee.

Miranda violation does not create civil liability

The U.S. Supreme Court recently clarified that the Miranda warning is not a constitutional right, but a reminder about a suspect's Fifth Amendment right to remain silent.

The clearly established rule is that before someone under arrest can be questioned, he first must be informed of his right to remain silent under *Miranda v. Arizona*, 304 U.S. 436 (1966).

This rule sometimes has obscured the distinction between the right to remain silent under the Fifth Amendment, and the giving of the Miranda warning itself. Some view the Miranda warning as a constitutional right.

In *Chavez v. Martinez*, 123 S.Ct. 1994 (2003), Oliverio Martinez sued police after an altercation that left him wounded. Besides filing a civil rights claim asserting police used excessive force, Martinez also claimed his constitutional rights were violated because he was interrogated without being Mirandized. The Supreme Court concluded that unless the confession is actually used against Martinez in a criminal prosecution, there is no constitutional violation. Martinez was not prosecuted for the altercation and, thus, his constitutional rights were not violated.

The case reinforces the fact that the penalty for failing to give a Miranda warning is exclusion of the statements from criminal trial. Un-Mirandized statements may be used in civil or administrative hearings without violating the Constitution. And failure to give a Miranda warning is not a constitutional violation.

The court ruling is not an invitation to avoid giving Miranda warnings. The case affirms the Miranda warning is not a constitutional right, but simply informs a suspect of a right to remain silent under the Fifth Amendment. The warning is mandatory when a suspect is in custody and subject to questioning.

MOPS' annual DWI, vehicular homicide training in May

The Missouri Office of Prosecution Services will conduct its annual DWI/Vehicular Homicide Training May 27-28 at Tan-Tar-A Resort in Osage Beach. Topics include:

- Investigating crash and determining driver.
- Review of NHTSA testing standards.
- Courtroom testimony.
- Alcohol impairment relative to driving.
- Making the case and the need for the second breath/blood test.
- Legal issues and current caselaw.
- Use of drug-recognition experts.

The training is for prosecutors and law enforcement and is POST-accredited through the Highway Patrol. For information, call Bev Case at 573-751-0619.